Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

ALVARO BOLANOS-MUNOZ, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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May 24, 2006

* The full list of Petitioners is set forth in the List of Parties, Infra p. ii.

QUESTION PRESENTED

Whether a defendant, whose sentence involved statutory and/or constitutional error under this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), must show, under the third prong of plain-error review, that there was a reasonable probability of a different result if the U.S. Sentencing Guidelines were merely advisory, rather than mandatory.

PARTIES TO THE PROCEEDING

The Petitioners are Alvaro Bolanos-Munoz and Rodrigo Bolanos-Munoz. Respondent is the United States of America.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

PARTIES TO THE PROCEEDING II

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

I. THE COURTS OF APPEALS ARE INTRACTABLY DIVIDED IN THEIR APPROACH TO PLAIN-ERROR REVIEW UNDER *BOOKER*. 8

II. THE COURTS OF APPEALS' VARYING APPROACHES TO PLAIN-ERROR REVIEW UNDERMINE FUNDAMENTAL PRECEPTS OF FAIRNESS IN SENTENCING. 12

III. THIS CASE IS AN EXCELLENT VEHICLE TO BRING UNIFORMITY TO *BOOKER* PLAIN-ERROR REVIEW AMONG THE COURTS OF APPEALS. 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Apprendi v. New Jersey,
530 U.S. 466 (2000) 5
Blakely v. Washington,
542 US 296 (2004) 5, 7
Bolanos-Munoz v. United States,
543 U.S. 1109 (2005) 3, 6
Chapman v. United States,
500 U.S. 453 (1991) 13
Johnson v. United States,
520 U.S. 461 (1997) 6
Koon v. United States,
518 U.S. 81 (1996) 13, 17
Rodriguez v. United States,
cert. denied, --- U.S. ---,125 S. Ct.
2935 (2005) 18, 22
Strickland v. Washington,
466 U.S. 668 (1984) 18
United States v. Ameline,
409 F.3d 1073 (9th Cir. 2005) 10, 11, 15
United States v. Antonakopoulus,
399 F.3d 68 (1st Cir. 2005) 11, 22
United States v. Barnett,
398 F.3d 516 (6th Cir. 2005) 9, 16
United States v. Bolanos-Munoz,
103 Fed. App'x. 665 (11th Cir. 2004) 5
United States v. Booker,
543 U.S. 220 (2005) ..... passim
United States v. Bruce,
396 F.3d 697 (6th Cir. 2005) 22
United States v. Cartwright,
413 F.3d 1295 (11th Cir. 2005) 12
United States v. Coles,
403 F.3d 764 (D.C. Cir. 2005) 10

TABLE OF AUTHORITIES (Cont.)

Page(s)

United States v. Cotton,
535 U.S. 625 (2002) 6
United States v. Crosby,
397 F.3d 103 (2d Cir. 2005) 10, 16
United States v. Davis,
407 F.3d 162 (3d Cir. 2005) 9, 10
United States v. Dazey,
403 F.3d 1147 (10th Cir. 2005) 11, 12
United States v. Dominguez Benitez,
542 U.S. 74 (2004) 18
United States v. Fields,
408 F.3d 1356 (11th Cir. 2005) 12
United States v. Gonzalez-Huerta,
403 F.3d 727 (10th Cir. 2005) 14
United States v. Greer,
375 F. Supp. 2d 790 (E.D. Wis. 2005) 17
United States v. Heldeman,
402 F.3d 220 (1st Cir. 2005) 12
United States v. Hughes,
396 F.3d 374, 381 n.7 (4th Cir. 2005) 10
United States v. Mares,
402 F.3d 511 (5th Cir. 2005) 11
United States v. Milan,
398 F.3d 445 (6th Cir. 2005) 9
United States v. Neufeld,
154 Fed. Appx. 813 (11th Cir. 2005) 17
United States v. Olano,
507 U.S. 725 (1993) 22
United States v. Paladino,
401 F.3d 471 (7th Cir. 2005) 10, 18
United States v. Pirani,
406 F.3d 543 (8th Cir. 2005) 9, 22
United States v. Rodriguez,
398 F.3d 1291 (11th Cir. 2005) ..... passim

TABLE OF AUTHORITIES (Cont.)

Page(s)

United States v. Sanchez,
269 F.3d 1250 (11th Cir. 2001).....6
United States v. Shelton,
400 F.3d 1325 (11th Cir 2005).....9, 22
United States v. Thompson,
422 F.3d 1285 (11th Cir. 2005).....11, 15, 16
United States v. White,
405 F.3d 208 (4th Cir. 2005).....10

Statutes

18 U.S.C. § 3553 .....13, 15, 17, 21
21 U.S.C. § 841 .....3, 4
28 U.S.C. § 1254(1) 1
28 U.S.C. § 994 13
46 U.S.C. App. § 1903 .....3, 4

Other Authorities

108 Cong. Rec. S8573
(daily ed. July 21, 2004).....13
Douglas A. Berman, *Balanced And Purposeful Departures: Fixing A Jurisprudence That Undermines The Federal Sentencing Guidelines*,
76 NOTRE DAME L. REV. 21 (2000) 17
James M. Anderson et al.,
Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines,
42 J.L. & ECON. 271 (1999).....14
Kate Stith & Jose A. Cabranes,
FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104 (1998) 12

TABLE OF AUTHORITIES (Cont.)

Page(s)

Michael W. McConnell, *The* Booker *Mess*,
83 DENV. U. L. REV. 665 (2006) 17
SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 21
Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*,
17 HOFSTRA L. REV. 1 (1988).....14
U.S.S.G Ch. 5, Pt. A.....20
U.S.S.G. § 3B1.2.....5, 21
U.S.S.G. §§ 5H1.1-5H1.6 16
United States Sentencing Guidelines
§ 2D1.1(b)(2)(B) (2001).....2, 4, 19

Rules

Federal Rule of Criminal Procedure 52(b).....2

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PETITION FOR WRIT OF CERTIORARI

Petitioners Alvaro Bolanos-Munoz and Rodrigo Bolanos-Munoz respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 2006 WL 460931.

JURISDICTION

The judgment of the court of appeals affirming petitioners' convictions and sentences was entered on February 27, 2006. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(b) provides:

> A plain-error that affects substantial rights may be considered even though it was not brought to the court's attention.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Sentencing Guidelines ("U.S.S.G.") § 2D1.1(b)(2)(B) (2001) provides in relevant part:

> If the defendant unlawfully imported or exported a controlled substance under circumstances in which *** the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

STATEMENT

Petitioners Alvaro Bolanos-Munoz and Rodrigo Bolanos-Munoz were found guilty by a jury of intent to distribute cocaine while aboard a vessel subject to U.S. jurisdiction and conspiracy to commit the same on May 23, 2002. Alvaro and

Rodrigo were sentenced to 292 months' imprisonment and 235 months' imprisonment, respectively, before the decision of this Court in *United States v. Booker*, 543 U.S. 220 (2005). Alvaro's sentence was adjusted upwards by two levels based on a fact not in the indictment or found by the jury beyond a reasonable doubt. Ricardo was denied a possible downward departure because the Guidelines discouraged or prohibited reliance on specific mitigating factors.

Petitioners appealed their sentences and convictions to the Eleventh Circuit Court of Appeals, which affirmed their convictions and sentences. Subsequently, this Court vacated the Eleventh Circuit's decision and remanded the case for further consideration in light of *Booker*. *Bolanos-Munoz v. United States*, 543 U.S. 1109 (2005). On remand, the court of appeals reviewed petitioners' sentences for plain-error, Fed. R. Crim. P. 52(b), because petitioners failed to raise their objections in the trial court. Pet. App. 2a. Finding no evidence in the record that the district court would have imposed a different sentence had it known that the Guidelines were advisory, the court of appeals held that petitioners' sentences did not affect their substantial rights, as is required under the third prong of plain-error review, and consequently re-affirmed petitioners' sentences. *Id.* at 3a.

1. Petitioners were aboard the *Recuerdo*, a Colombian fishing vessel, when the vessel was searched by the U.S. Coast Guard on August 2, 2001. The Coast Guard's search uncovered substantial amounts of cocaine stored in a hidden compartment in the craft. Petitioners and others aboard the vessel were then arrested and transferred to a Navy vessel for transport to the Middle District of Florida for prosecution.

2. On August 9, 2001, petitioners were indicted and charged with (1) possession with intent to distribute cocaine while aboard a vessel subject to U.S. jurisdiction, in violation of the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1903(a) and 21 U.S.C. § 841(b)(1)(A)(ii); and

(2) conspiracy to possess with intent to distribute cocaine while aboard a vessel subject to U.S. jurisdiction, in violation of 46 U.S.C. App. § 1903(a), (j), and 21 U.S.C. § 841(b)(1)(A)(ii). On May 23, 2002, a jury found petitioners guilty of both counts.

3. After rejecting petitioners' emergency motion to obtain new counsel and to stay the sentencing hearing, petitioners were sentenced on October 7, 2002.

a. Applying the then mandatory Sentencing Guidelines, the court imposed a sentence of 292 months' imprisonment on Alvaro Bolanos-Munoz; the lowest possible sentence for an offense level of 40 and a criminal history category of 1. Over counsel's objection,[1] Alvaro's sentence was enhanced by two offense levels based on the court's finding that he was a "captain...aboard [a] craft or vessel carrying a controlled substance." *See* U.S.S.G § 2D1.1(b)(2)(B). The court's finding that Alvaro was the ship's captain was not asserted in the indictment and was never the subject of the jury's deliberations or findings.

In response, the Government asserted that the question of who was responsible for the drugs is different from the question of who was responsible "as the captain for getting the vessel to where it needs to go." 10/7/02 Sent. Tr. 15. Despite that distinction, the government conceded that Alvaro was not steering the ship when it was boarded. *Id.* at 16. The court added that Alvaro was just the "de facto captain" of the vessel, and it was another man who was "actually running the boat." *Ibid.* Despite these findings, the court denied Alvaro's motion. *Ibid.*

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[1] 10/7/02 Sent. Tr. 13-14. Counsel also made a number of other objections to the Pre-Sentence Investigation Report. *Id.* at 10-13. The court relied solely on Alvaro's status as the "captain" of the *Recuerdo* in enhancing his sentence.

b. Rodrigo's sentence of 235 months' imprisonment was likewise the lowest possible sentence for his applicable Guideline range--an offense level of 38 and criminal history category of 1.

Rodrigo's counsel objected to the Pre-Sentence Investigation Report's failure to credit him with an adjustment as a minor participant in the offense. 10/7/02 Sent. Tr. 6; *see* U.S.S.G. § 3B1.2. Rodrigo claimed that he was merely a "fisherman by title," and continually asserted his innocence. Counsel added that despite the guilty verdict, there was "no information" that suggested that he was anything more than a fisherman. *Id.* at 6.

Furthermore, counsel argued that Rodrigo's sentence should be mitigated based on his socio-economic status and family responsibilities. Rodrigo stated that he never received any money for transporting drugs and denied participating in any "drug trip." *Id.* at 8. As a result of his incarceration, his family, which includes three of his children, were living in his mother-in law's house and were in need of money. *Ibid.* He added that he was forty years old and had never been in this type of trouble before. *Ibid.*

The court acknowledged Rodrigo's plea for leniency based on his family responsibilities, and his socio-economic background. The judge informed Rodrigo that he would "consider" those factors. *Id.* at 10. Perfunctorily, the court imposed a sentence of 235 months of imprisonment. *Id.* at 9.

4. Next, petitioners unsuccessfully appealed their convictions and sentences on various grounds, including the validity of their sentences under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See United States v. Bolanos-Munoz*, 103 Fed. App'x. 665 (11th Cir. 2004) (Table Decision). Shortly after the Eleventh Circuit rejected petitioners' appeal, this Court decided *Blakely v. Washington*, 542 US 296 (2004) and subsequently, *United States v. Booker*, 543 U.S. 220 (2005). This Court then vacated the appellate court's decision and remanded the case for further consideration in

light of *Booker*. *Bolanos-Munoz v. United States*, 543 U.S. 1109 (2005).

On remand, the court of appeals reviewed petitioners' sentences for plain-error because "defendants raised, among other things, a *Booker*-type issue in their Initial Brief on appeal[,]" but failed to raise their objections in the district court. Pet. App. 2a, citing *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005); *United States v. Sanchez*, 269 F.3d 1250, 1280 (11th Cir. 2001). To establish plain-error, the defendant must show that there was error, that the error was "plain," that it "affect[ed] substantial rights," and that it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Cotton*, 535 U.S. 625, 631-632 (2002) (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)).[2]

The court of appeals found that the first two prongs of plain-error review were met: the petitioners' sentences were erroneous under *Booker*, and the error was plain at the time of appeal. Pet. App. 3a. Both petitioners' sentences were found to have committed statutory *Booker* error because the Guidelines were misapplied as binding rather than advisory. *Id.* at 2a. But only Alvaro's sentence presented constitutional *Booker* error because his sentence was enhanced based on facts not found by the jury—an enhancement for acting as the vessel's "captain"—in violation of the Sixth Amendment of the U.S. Constitution. *Ibid.*

To determine whether the defendants' "substantial rights" had been affected, the Eleventh Circuit asks "whether

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[2] Additionally, "'[i]f all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Cotton*, 535 U.S. at 631 (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in this case." *Id.* at 3a. (quoting *United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir. 2005)). Applying this standard, the court rejected petitioners' appeal, having found no evidence in the record that suggests that the judge would have imposed a different sentence if the Guidelines were advisory. *Ibid.* The court of appeals also rejected petitioners' claim that the district court's imposition of a sentence at the bottom of the Guideline range evidenced a desire for a more lenient sentence, which would have manifested itself if the Guidelines were advisory. *Ibid.* This petition followed.

REASONS FOR GRANTING THE PETITION

This case affords the Court an opportunity to resolve an important inter-circuit split which goes to the fundamental fairness and equity of federal sentencing: What must a defendant show under the third prong of plain-error review to demonstrate that his sentence affected his substantial rights? There are compelling reasons for this Court to review the court of appeals' decision, which has broad implications for the integrity of federal sentencing.[3]

First, the courts of appeals are deeply divided on *Booker* plain-error analysis. A three-way rift separates the courts of appeals on the proper approach to plain-error review, and even further division is apparent within some of those

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[3] Two months ago, the Court heard oral arguments in *Washington v. Recuenco* (No. 05-83), which posed the question of whether *Blakely* errors are structural. Because *Recuenco* may influence the outcome of this case, the Court's should defer its decision on this petition until after *Recuenco* is decided, and if the Court decides that *Blakely* errors are structural, it should grant this petition to quickly bring uniformity to the federal system.

circuits. Many defendants are affected by this issue and only this Court can bring uniformity to this area of the law.

Second, the varying approaches of the courts of appeals have yielded inconsistent results across the country, creating significant sentencing disparities. The laudable goals of uniformity and equity in sentencing which underlie the Sentencing Reform Act ("SRA") are being eroded by an approach that greatly disadvantages certain defendants based solely on where a crime was committed. This Court reaffirmed its commitment to the SRA and the principles which it stands for in *Booker*, but a significant number of defendants have been denied the equity in federal sentencing promised by the SRA. Indeed, the significance of this issue compelled the government to acquiesce to a prior petition for certiorari on this matter.

Third, this case is particularly well suited to address these issues because the lower court committed both statutory and constitutional error in petitioners' case. In addition, this case comes from the Eleventh Circuit, which has proven to be most hostile to defendants' claims that either species of *Booker* error has affected their substantial rights.

I. The Courts Of Appeals Are Intractably Divided in their Approach to Plain-Error Review under *Booker*.

In *Booker*, this Court held that sentencing enhancements made pursuant to mandatory Federal Sentencing Guidelines and based on judicially-found facts violated the Sixth Amendment. 543 U.S. at 228-35. The Court struck the statutory provisions making the Federal Sentencing Guidelines mandatory, and rendered the Guidelines effectively advisory. *Id.* at 244-46. The Court further directed that courts "must apply [the Court's] holdings—both the Sixth Amendment holding and [the Court's] remedial interpretation of the Sentencing Act—to *all* cases on direct review." *Id.* at 268 (emphasis added).

Thus, under *Booker*, there are two kinds of sentencing errors: constitutional and statutory. "[T]he Sixth Amendment right to trial by jury is violated where under a mandatory guidelines system a sentence is increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury." *United States v. Rodriquez*, 398 F.3d 1291, 1297 (11th Cir. 2005). In addition, "[a]s a result of *Booker's* remedial holding, *Booker* error exists when the district court misapplied the Guidelines by considering them as binding as opposed to advisory." *United States v. Shelton*, 400 F.3d 1325, 1330-31 (11th Cir 2005). Statutory error occurs where a district court sentences a defendant "under a mandatory Guidelines scheme, even in the absence of a Sixth Amendment enhancement violation." *Ibid.*

In cases, such as this one, where the defendant fails to make a *Booker* objection in the trial court, the court of appeals reviews the sentence for plain error. The courts of appeals, however, are divided three ways on the defendant's burden to demonstrate that his substantial rights were affected by either statutory or constitutional *Booker* error. The differences among the courts of appeals on this issue are real and outcome determinative. *See United States v. Pirani*, 406 F.3d 543, 563 (8th Cir. 2005) (en banc) (Bye, J., dissenting) (describing the "split as a three-ring circus with twelve unique acts each attempting to dazzle us with its compelling logic"). The three different approaches are described below.

1. Presumption of Error. The Third and Sixth Circuits have held that there is a presumption that all *Booker* errors affect substantial rights. *United States v. Davis*, 407 F.3d 162, 163-66 (3d Cir. 2005) (en banc); *United States v. Barnett*, 398 F.3d 516, 526-29 (6th Cir. 2005); *United States v. Milan*, 398 F.3d 445, 451 (6th Cir. 2005) (It is "clear" that a sentence "longer than the maximum sentence authorized [under the Guidelines] by the facts [the defendant] admitted when he pled guilty" affects substantial rights within the

meaning of the third plain-error prong). The Third Circuit has justified its approach, in part, because Booker errors "are best determined by the District Court in the first instance." *Davis*, 407 F.3d at 183.

In *United States v. Hughes*, the Fourth Circuit found plain-error even where "[t]he record does not provide any indication of what sentence the district court would have imposed had it ... treat[ed] the guidelines as merely advisory." 396 F.3d 374, 381 n.7 (4th Cir. 2005). The court held that the defendant's "substantial rights" were affected adversely by the mere fact that the defendant's sentence was higher than the maximum Guidelines sentence justified by the facts found by the jury. *Id.* at 380 n.6. But a defendant who claims only statutory error must establish prejudice. *United States v. White*, 405 F.3d 208, 217-20 (4th Cir. 2005).

2. Limited Remands. The Second, Seventh, Ninth, and D.C. Circuits have all embraced a "limited remand" procedure when reviewing a sentence for plain error. Under this approach, it is the district court, not the court of appeals, that must determine if the defendant's substantial rights were affected, as is required under the third prong. *United States v. Crosby*, 397 F.3d 103, 117-20 (2d Cir. 2005); *United States v. Paladino*, 401 F.3d 471, 483-84 (7th Cir. 2005); *United States v. Ameline*, 409 F.3d 1073, 1079 (9th Cir. 2005) (en banc); *United States v. Coles*, 403 F.3d 764, 769-71 (D.C. Cir. 2005).

Not all remands require a resentencing under this approach. In *Crosby*, the Second Circuit explained that the appropriate disposition "for pre-*Booker/Fanfan* sentences pending on direct review will be a remand to the district court, not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine *whether* to resentence." 397 F.3d at 117 (emphasis in original). Taking a similar view of the issues, the Ninth Circuit observed that "it is the *truly* exceptional case that will not require remand for

resentencing under the new advisory guideline regime." *Ameline*, 409 F.3d at 655 (emphasis in original).

3. A Reasonable Probability of a Different Result. A third approach has been followed by the Eleventh Circuit, as well as the First, Fifth, Eighth, and Tenth Circuits, which require a defendant to show that his sentence was affected by the mandatory application of the Guidelines. *United States v. Antonakopoulus*, 399 F.3d 68, 75 (1st Cir. 2005); *United States v. Mares*, 402 F.3d 511, 521 (5th Cir. 2005); *Pirani*, 406 F.3d at 550-53; *United States v. Dazey*, 403 F.3d 1147, 1175-77 (10th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005). Under this approach, there must be some indication in the record that the judge would have imposed a different, more lenient sentence, if he were free to sentence outside the Guideline range.

The Eleventh Circuit's approach has the appellate court, rather than the sentencing court, search for the "magic words" which might suggest that if the judge were not bound by the Guidelines, he would have imposed a different sentence. As one of the judges of that court has explained:

> [W]e do not generally reverse a sentence unless the district court has stated on the record that the guideline sentence is too high ***. That is, we vacate a sentence only where the judge has spoken some combination of these "magic words." Thus, at oral argument, if defense counsel begins a plain-error *Booker* argument, I immediately ask whether we will find any "magic words" in the record; if the answer is "no," then there is no reason for counsel to pursue the issue further.

United States v. Thompson, 422 F.3d 1285, 1303 (11th Cir. 2005) (Tjoflat, J., specially concurring).

Furthermore, the Eleventh Circuit has narrowly construed the types of evidence it will consider in

determining whether a different result is probable under an advisory Guideline system. For example, despite its tendency to suggest the district court's desire for leniency, the Eleventh Circuit has held that "[a] sentence at the low end of the guidelines, without more, does not meet this third prong of the plain error test." *United States v. Rodriguez*, 2006 WL 14582 (11th Cir. Jan. 4, 2006) (citing *United States v. Cartwright*, 413 F.3d 1295 (11th Cir. 2005), and *United States v. Fields*, 408 F.3d 1356 (11th Cir. 2005)). Even among her sister courts which have adopted the "reasonable probability of a different result" standard, the Eleventh Circuit is especially sparing in granting remands for resentencing, or even reconsideration of the sentence by the district court.

For example, the First Circuit is not "overly demanding as to proof of probability where, either in the existing record or by plausible proffer, there is reasonable indication that the district judge might well have reached a different result under advisory guidelines." *United States v. Heldeman*, 402 F.3d 220, 224 (1st Cir. 2005). In cases where there is constitutional *Booker* error, such as this one, the Tenth Circuit applies its standard "less rigidly." *Dazey*, 403 F.3d at 1177. The Eleventh Circuit's standard, in contrast, "is anything but easy" to satisfy, *Rodriguez*, 398 F.3d at 1299, looks solely to the existing record, *id.* at 1301, and "make[s] no functional distinction between constitutional and statutory error," *Rodriguez*, 406 F.3d at 1262 (Carnes, J., concurring in the denial of reh'g en banc).

II. The Courts Of Appeals' Varying Approaches To Plain-Error Review Undermine Fundamental Precepts Of Fairness In Sentencing.

One of Congress' primary motivations for passing the SRA was the desire to eliminate sentencing disparities which plagued the federal system for decades. Kate Stith & Jose A. Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104 (1998) ("Reduction of

'unwarranted sentencing disparities' was a—probably *the*—goal of the Sentencing Reform Act of 1984"); 18 U.S.C. § 3553(a)(6) (addressing the desire to reduce unwanted sentencing disparities). Prior to the implementation of the Guidelines, federal sentencing was plagued by drastic sentencing disparities that turned on capricious factors, like the defendant's appearance before a particularly lenient or strict judge, and on far more pernicious factors, such as racial prejudice. *See, e.g.*, 108 Cong. Rec. S8573 (daily ed. July 21, 2004) (statement of Sen. Leahy) (describing sentencing before the advent of the SRA as the "bad old days" because "improper factors such as race, geography and the predilections of the sentencing judge could drastically affect the sentence."). In the absence of sentencing guidelines, similarly-situated defendants were sentenced to disparate terms of imprisonment based on mere geography and in some cases, sheer luck.

This Court, which was careful in *Booker* to craft a remedy to the Guidelines' constitutional defect which was consistent with Congressional intent, acknowledged that, "Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing." 543 U.S. at 255 (majority opinion of Breyer, J.); *see also id.* at 253 ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."). The Court has also noted that "[t]he goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." *Koon v. United States*, 518 U.S. 81, 113 (1996); *see also, e.g., Chapman v. United States*, 500 U.S. 453, 473 (1991) (Stevens, J., dissenting) ("[O]ne of the central purposes of the Sentencing Guidelines ... was to eliminate disparity in sentencing"); 28 U.S.C. § 994(f) (directing the Sentencing Commission to pay "particular attention to the [statutory] requirements ... for providing

certainty and fairness in sentencing and reducing unwarranted sentence disparities").

Since 1987, the Sentencing Guidelines have made great progress in reducing unwanted sentencing disparities, but for a significant number of defendants who failed to raise a *Booker* claim at sentencing, but whose cases were on direct review when *Booker* was decided, the dedication of the Congress and this Court to the principles imbued in the SRA have been only partially fulfilled. *See* James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271 (1999) (showing that the Guidelines have been effective in reducing interjudge sentencing disparities). Defendants in the First, Fifth, Eighth, Tenth, and especially Eleventh Circuit, have been denied an opportunity to have the court which sentenced them reconsider their sentence under a radically different sentencing regime. Had these crimes been committed in the Second, Third, Fourth, Sixth, Seventh, Ninth or D.C. Circuits, the possibility of a remand for reconsideration of their sentence would have been significantly greater. It is clear that, "This wide ranging circuit split results in the disparate treatment of criminal defendants throughout the nation. Such uneven administration of justice cries out for a uniform declaration of policy by the Supreme Court." *United States v. Gonzalez-Huerta*, 403 F.3d 727, 763 (10th Cir. 2005) (en banc) (Lucero, J., dissenting).

Among the disparities which motivated Congress to pass the SRA and this Court in *Booker* to preserve the SRA's salutary effect on sentencing, were inter-jurisdictional sentencing disparities. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988) (citing Sentencing Commission study which states that prior to the Guidelines, "the region in which the defendant is convicted is likely to change the length of time served from approximately six months more if one is sentenced in the

South to twelve months less if one is sentenced in Central California…"). Congress and this Court have long understood that in a federal system, justice must be uniform and in terms of sentencing, that means that a federal crime committed in California must be treated the same as one committed in Florida. The current circuit split over plain-error glosses over this inequity in federal sentencing, and its impact, which is measured in additional months of imprisonment, is all too real, because judges have shown a propensity to sentence defendants to more lenient sentences, when the strictures of the Guidelines are relaxed.

From a pragmatic perspective, the Eleventh Circuit's approach to plain error asks the appellate court to find a needle in a haystack; "it was very rare for a judge, within the record of an individual case, to express" frustration with the binding nature of the Guidelines. *Ameline*, 409 F.3d at 1079. Given how rare it would be for a judge to express what would, in effect, be an alternative sentence in such a circumstance, *see* 18 U.S.C. § 3553(b)(1) (requiring courts to impose the relevant Guideline sentence), it is not unduly harsh to characterize this method of appellate review as "arbitrary." *United States v. Thompson*, 422 F.3d 1285, 1305 (11th Cir. 2005) (Tjoflat, J., specially concurring).

In addition to the rarity of such statements, it bears emphasis that the sentencing court's failure to suggest that it would have imposed a lighter sentence does not mean that the court would not impose a different sentence under an advisory Guideline system. *United States v. Ameline*, 409 F.3d 1073, 1082 (9th Cir. 2005) (en banc) ("It would … be a mistake to infer from a district court's [pre-*Booker*] silence that the district court would not have made a different decision under a different sentencing scheme."). This observation underlies the presumption of error and limited remand approaches but is seemingly brushed aside by the Eleventh Circuit's approach.

Pre-*Booker*, there was no "need or incentive for sentencing courts ... to note their objections and reservations in sentencing defendants under the then-mandatory Guidelines." *United States v. Barnett*, 398 F.3d 516, 528-29 (6th Cir. 2005). With respect to sentencing, "[s]ilence [on the record] often means nothing more than that an experienced judge underst[ood] his or her proper role in the criminal justice system." *United States v. Thompson*, 422 F.3d 1285, 1305 (11th Cir. 2005) (Tjoflat, J., specially concurring). The same is true of defendant's counsel, who may not have raised objections to long-established prohibited mitigating factors, *see, e.g.*, U.S.S.G. §§ 5H1.1-5H1.6, such as the defendant's lack of guidance as a youth, U.S.S.G. § 5H1.12 (policy statement), because such objections would have been a waste of the court's limited time. Indeed, it is "impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a nonGuidelines sentence." *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005).

The Guidelines encouraged uniformity, but they also encouraged efficiency by centralizing certain policymaking decisions—such as grounds for departures—in the Sentencing Commission. The efficiency of the system was realized by removing certain issues from the discretion of the sentencing judge, thereby limiting the universe of possible claims and outcomes. The Eleventh Circuit requires *ex post*, evidence on the record which it surely would have found inconsistent *ex ante*, with the charge of the SRA and the Sentencing Commission.

The Eleventh Circuit's refusal to remand *Booker* plain-error cases has undoubtedly extended the prison terms of many defendants because sentencing courts have proven to be more lenient under the current, advisory Guideline system, largely because courts can now more fully consider the offender and the offense. Before *Booker*, judges were required to apply the Guidelines, including the provisions of

Chapter 5, which limited or prohibited judges from relying on many mitigating factors when imposing a sentence. U.S.S.G. Ch. 5. For a judge to sentence a defendant outside the applicable Guideline range, the defendant had to establish that he was outside the "heartland of typical cases." *Koon v. United States*, 518 U.S. 81, 94 (1996); *see* 18 U.S.C. § 3553(b)(1). And meeting that standard proved to be quite difficult. *See* Douglas A. Berman, *Balanced And Purposeful Departures: Fixing A Jurisprudence That Undermines The Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 81-84 (2000) (finding that *Koon* had no significant effect on departure rates).

In the year following *Booker*, "[t]he rate of judge-instigated downward departures or variances more than doubled, from 6% to 13%." Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 672 (2006). The data shows that defendants sentenced pre-*Booker* and later resentenced post-*Booker* are also benefiting from lighter sentences. In one circuit, in cases remanded for resentencing under the harmless error standard, the defendant received a lower sentence 50% of the time. *Id.* at 671-72. Strikingly, every defendant received a lower sentence, and more than half were granted reductions of 40% or more, when their sentences were reviewed for plain error. *Ibid.*

These statistics are the result of an advisory Guideline system. Several mitigating sentencing factors, once prohibited or discouraged, are now grounds for departure. For example, courts now mitigate defendants' sentences based on the effect a guideline sentence would have on their children. *See, e.g., United States v. Greer*, 375 F. Supp. 2d 790 (E.D. Wis. 2005). Furthermore, district courts are imposing less severe sentences in order to comply with the statutory parsimony principle, which states that a sentence should be "sufficient, but not greater than necessary, to comply with" the statute's sentencing objectives. 18 U.S.C. § 3553(a); *see, e.g., United States v. Neufeld*, 154 Fed. Appx. 813, 823 (11th Cir. 2005) ("Under the new advisory-

guidelines system, a more-than-adequate sentence would conflict with § 3553(a)'s injunction against greater-than-necessary sentences.").

Despite the transformation of the Guidelines and the supporting statistics, which themselves cast grave doubt over the Eleventh Circuit's method of plain-error review, defendants in 23 states have been "condemn[ed] ... to serve an illegal sentence." *United States v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005). Additionally, the reach of this dispute over plain error may not be limited to sentencing. The government has previously observed that, "[s]ome of the differences among the courts of appeals illuminate basic disagreements about the proper approach to plain-error review and they therefore have the potential to affect cases not involving *Booker* error." Brief for the United States at 19, *Rodriguez v. United States, cert. denied*, --- U.S. ---,125 S. Ct. 2935 (2005) (acquiescing in a grant of certiorari on this issue).

This Court can easily resolve the plain-error impasse and prevent future circuit splits by looking to the Court's decision in *Dominguez Benitez*. *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). In *Dominguez Benitez*, this Court clearly stated that the third-prong test is "not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different." 124 S. Ct. at 2340 n.9 (emphasis added). Defendants need only show that the possibility of a different result is "'sufficient to undermine confidence in the outcome' of the proceeding." *Id.* at 2340 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). The circuits that have embraced a "reasonable probability of a different result" standard have imposed on defendants the precise burden this Court rejected in *Dominguez Benitez*.

III. This Case is An Excellent Vehicle to Bring Uniformity to *Booker* Plain-Error Review Among the Courts of Appeals.

The Court should grant this petition because it squarely presents both *Booker* statutory error and constitutional error. Both defendants (as well as countless others) have been irreparably harmed by sentences, which in many cases, would have been reduced if their crimes had been committed in a different jurisdiction. Furthermore, this case comes from the Eleventh Circuit Court of Appeals, which has proven to be exceptionally hostile to claims of *Booker* plain error. Granting this petition would allow the Court to directly engage the court of appeals' reasoning.

Alvaro's sentence presents both constitutional and statutory *Booker* error. His sentence violated the Sixth Amendment because he received an enhancement to his sentence based on facts found by the judge and not the jury. The district court further erred by sentencing Alvaro based on the assumption that the Guidelines were mandatory, and not merely advisory.

As a result of unconstitutional judicial fact finding, Alvaro's offense level was increased by two levels. The district court imposed the two-level enhancement under U.S.S.G. § 2D1.1(b)(2)(B) based on Alvaro's role as the captain aboard a vessel carrying a controlled substance. Counsel objected to this enhancement on the grounds that the government had alleged that another individual was in charge of the vessel. Counsel argued that another person on board was the person in charge of the vessel because he, not Alvaro, represented the drug cartel. 10/7/02 Sent. Tr. 14. Counsel maintained that Alvaro was "like the other crewmen on the boat[.]" *Ibid.* Even the sentencing judge recognized during the sentencing hearing that Alvaro "wasn't steering

the ship." 10/7/02 Sent. Tr. 13-14, 16.[4] Nonetheless, the district court imposed the two-level enhancement.

The two-level increase resulted in an increase in Alvaro's offense level from a level 38, criminal history category I, which required the district court to impose a sentence of 235-293 months' imprisonment, to a level 40, criminal history category I, which required the district court to impose a sentence of 292-365 months' imprisonment. *See* U.S.S.G Ch. 5, Pt. A (sentencing table); 10/7/02 Sent. Tr. 19.

The district court also erred by sentencing Alvaro and Rodrigo under a mandatory Guidelines system. In both cases, the mandatory Guidelines system manifestly affected the outcome of the proceedings. The district court sentenced both defendants at the absolute bottom of the applicable sentencing range.[5] Moreover, because the district court assumed that the Guidelines were mandatory, it was forced to impose this extremely lengthy minimum sentence even though he had absolutely no prior criminal history. *See* Pre-Sentence Investigation Report at 4. Had the district court been given the flexibility it now possesses as a result of *Booker*, both defendants could have raised a host of mitigating factors and the court would have been free to consider them.

Although Rodrigo's sentence presents only statutory error, there is good reason to believe that his sentence would be reduced if the district court was given an opportunity to reconsider his sentence. Rodrigo maintained that he was

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[4] Moreover, in his Initial Brief, Alvaro argued that these findings were erroneous given that he never "imported" a controlled substance, but rather was caught offshore. *See* Initial Br. at 27-28.

[5] Alvaro received a sentence of 292 months' imprisonment out of a possible 292-365 month range and Rodrigo received a sentence of 235 months' imprisonment out of a possible 235-293 month range. 10/7/02 Sent. Tr. 19, 9.

merely a crew member/fisherman on the *Recuerdo*, and that he was unaware of the cargo and believed that the boat was merely out on a commercial fishing trip. *See* 10/7/02 Sent. Tr. 5-6. At the sentencing hearing, Rodrigo stated that he "never received any money" and never participated in any "drug trip." *Id.* at 8. In sum, he consistently maintained that he was a "poor person, innocent." *Id.* at 11. Rodrigo's counsel argued at sentencing that he didn't "recall any evidence that came out that placed him in any position that close to those other individuals...And I think that there's no question that the jury did find him guilty, but there is no information as to what exactly did he specifically do [*sic*] that would change that role." *Id.* at 6. Although the district court denied him a downward departure as a "minimal" or "minor" participant, as those terms are restrictively defined by the Guidelines, *see* U.S.S.G. § 3B1.2 (permitting a 4 and 2 level downward departure, respectively), under *Booker*, the court could have reduced his sentence by looking to the "nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553 (a)(1).

This petition presents significant issues regarding the legality of a defendant's term of imprisonment, a serious deprivation of liberty which merits the attention of this Court. The number of defendants who are affected by the approach taken by the Eleventh Circuit, as well as other circuit courts, is difficult to estimate, but it is surely substantial. In fiscal year 2004 and 2003, over 140,000 defendants were sentenced under the Guidelines. *See* 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 2 (70,068 sentenced); 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 2 (70, 258 sentenced). It is likely that a sizeable number of these defendants' sentences were on direct review when *Booker* was decided, early in 2005. Although the issue presented is largely one that is "transitional," the government has supported granting a petition to clarify plain-error review in the sentencing context, as well as other areas of the law which may be

affected by the circuit split. *See* Brief for the United States at 18-19, *Rodriguez v. United States, cert. denied,* --- U.S. ---, 125 S. Ct. 2935 (2005).

Finally, the error in this case "seriously affects the fairness, integrity, or public reputation of judicial proceedings[,]" which is the final requirement under plain error review. *United States v. Olano,* 507 U.S. 725, 732 (1993). Once remanded, the lower court will be bound by circuit precedent, which states that once the defendant shows that he would have received a lower sentence under advisory guidelines, the fourth prong of plain error review is satisfied. *See United States v. Shelton*, 400 F.3d 1325, 1333-34 (11th Cir. 2005) (where district court "indicated an express desire to impose a sentence lesser than the low end of the Guidelines range," defendant carried his burden to establish third and fourth prongs of plain-error test). Other courts have held that the fourth prong of plain error review is met, even when the district court is silent at sentencing, but there is a reasonable probability that the sentence would have been lighter under an advisory system. *See United States v. Antonakopoulus,* 399 F.3d 68, 81 (1st Cir. 2005). But any dispute as to the fourth prong is a basis for granting this petition, not rejecting it, as there is division among the circuits on the fourth prong, as well. *See United States v. Pirani,* 406 F.3d 543, 554 (8th Cir. 2005) (en banc) ("[W]e do not foreclose the possibility that there may be plain *Booker* errors that meet the third *Olano* factor but not the fourth"), *quoting United States v. Bruce,* 396 F.3d 697, 719-20 (6th Cir. 2005).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX
TABLE OF CONTENTS

Description	Page
U.S. Court of Appeals for the Eleventh Circuit, Opinion (February 27, 2006)	1a

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALAVARO BOLANOS-MUNOZ, et al.,
Defendants-Appellants.

No. 02-15861

February 27, 2006.

Before **EDMONDSON**, Chief Judge, **DUBINA** and **COX**, Circuit Judges.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:

This case is before the court for consideration in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). A jury found the defendants guilty of (1) possession with intent to distribute cocaine while aboard a vessel subject to U.S. jurisdiction, in violation of the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1903(a) and 21 U.S.C. § 841(b)(1)(A)(ii); and (2) conspiracy to possess with intent to distribute cocaine while aboard a vessel subject to U.S. jurisdiction, in violation of 46 U.S.C. App. § 1903(a), (j), and 21 U.S.C. § 841(b)(1)(A)(ii). We previously affirmed the defendants' convictions and sentences. See *United States v. Bolanos-Munoz*, 103 Fed. App'x. 665 (11th Cir. 2004) (Table Decision). The Supreme

Court vacated our prior decision and remanded the case to us for further consideration in light of Booker. *Bolanos-Munoz v. United States*, 543 U.S. 1109, 125 S.Ct. 1016, 160 L.Ed.2d 1038 (2005). For the reasons that follow, we once again affirm the defendants' convictions and sentences.

Under the Supreme Court's decision in Booker, "the district courts could have made both a constitutional and a statutory error in sentencing defendants...." *United States v. Mathenia*, 409 F.3d 1289, 1291 (2005). "The constitutional error is the use of the extra-verdict enhancements to reach a guidelines result that is binding on the sentencing judge: the error is in the mandatory nature of the guidelines once the guidelines range has been determined." *Id.* (quotations and citations omitted). The statutory error happens "when the district court misapplies the [g]uidelines as binding as opposed to advisory." *United States v. Shelton*, 400 F.3d 1325, 1331 (11th Cir. 2005).

In the instant case, the defendants raised, among other things, a Booker-type issue in their Initial Brief on appeal. However, the defendants did not present this issue in the district court. As such, we review their sentencing challenges for plain error. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005), *cert. denied*, --- U.S. ---, 125 S.Ct. 2935, 162 L.Ed.2d 866 (2005); *United States v. Sanchez*, 269 F.3d 1250, 1280 (11th Cir. 2001). At sentencing, the district court increased Alvaro's offense level based upon his role as the captain of the subject vessel, imposing his sentence under the belief the guidelines were mandatory. Therefore, Alvaro's appeal involves both *Booker* constitutional and statutory error. *See Shelton*, 400 F.3d at 1330- 31. As to Rodrigo, the district court imposed his mandatory guidelines sentence without using any extra-verdict enhancements. Thus, Rodrigo's appeal only involves *Booker* statutory error. *See id.*

Although both defendants meet the first two prongs of the plain error test, neither of them can satisfy the third prong concerning "the burden of demonstrating that the error has affected his substantial rights." *United States v. Fields*, 408 F.3d 1356, 1360 (11th Cir. 2005). To make this determination, "we ask whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in this case." *Rodriguez*, 398 F.3d at 1301. And, based on our review of the record, there is no indication that the district court would have imposed lesser sentences had it known that the guidelines were advisory. The defendants' contention that the district court would have imposed lesser sentences because it believed both defendants should be sentenced at the bottom or lowest end of the guideline range is without merit. As we found in *Fields*, such a view or belief by the district court "does not establish a reasonable probability that the court would have imposed a lesser sentence under an advisory regime." 408 F.3d at 1360-61 (agreeing "with the First, Fourth, Fifth and Eighth Circuits that the fact that the district court sentenced [a] defendant to the bottom of the applicable guidelines range establishes only that the court felt that sentence was appropriate under the mandatory guidelines system"). Accordingly, we affirm the defendants' sentences for the reasons outlined herein, and reinstate our prior opinion affirming the defendants' convictions and sentences.

OPINION REINSTATED; CONVICTIONS AND SENTENCES AFFIRMED.